Supreme Court, U.S.
FILED
FEB 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DELTA RESINS & REFRACTORIES, INC., et al.,
Petitioners,

v.

ASHLAND OIL, INC.,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DONALD E. EGAN*
COOK, WETZEL & EGAN, LTD.
135 South LaSalle Street
Suite 3300
Chicago, Illinois 60603
(312) 236-8500
Attorneys for Petitioners

*Counsel of record

February 7, 1986

Pandick Midwest, Inc., Chicago • 733-6000

TABLE OF CONTENTS

	PAGE
SYNOPSIS	1
ARGUMENT	2
A. The Trial Record Shows Kopac's Testimony Was Admitted Under Rule 702	2
B. Rules of Evidence	3
C. Due Process Argument	5
CONCLUSION	6

TABLE OF AUTHORITIES

Cases

PAGE

Calhoun v. *Honda Motor Co., Ltd.*, 738 F.2d 126, 132 (6th Cir. 1984) 4

Universal Athletic Sales Co. v. *American Gym, Recreational & Athletic Equipment Corp., Inc. et al.*, 546 F.2d 530 (3 Cir. 1976), cert. den., 430 U.S. 984 (1977) 4

Other Authorities

Federal Rule of Civil Procedure 52(a) 6

Federal Rule of Evidence 701 ..... 2, 3

Federal Rule of Evidence 702 ..... 3, 4

3J. Weinstein & M. Burger, *Weinstein's Evidence*, § 702[04] (1981) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DELTA RESINS & REFRACTORIES, INC., et al.,
Petitioners,

v.

ASHLAND OIL, INC.,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SYNOPSIS

The Court of Appeals for the Federal Circuit reversed the District Court Judgment that Ashland's patents were invalid, holding that Delta's sole witness, Jordan Kopac, was not an expert and that a lack of factual support rendered his opinions of little probative value.

Ashland's Brief in Opposition argues, with no support, that the District Court received Kopac's testimony under Rule 702 as the testimony of a lay witness.

ARGUMENT

A. The Trial Record Shows Kopac's Testimony Was Admitted Under Rule 702

When Mr. Kopac was first asked about literature concerning particular types of phenol formaldehyde resins, Ashland objected to Kopac giving "expert testimony" [TT 727]. Ashland's objection was based on the "dual grounds of surprise and lack of expert qualifications" (Ashland Brief, p.2).

After some colloquy, the Court said: "I will simply overrule your objection . . . ." [TT 729].

Ashland's counsel continued to press his objection based on "surprise" to which the District Court said: "I don't think there are any surprises to this thing. You have been through this for, what, ten years?" [TT 730].

The subsequent colloquy shows Ashland's "surprise" was predicated on the elimination of Dr. Wendland as a live witness. Early in the trial, Delta had objected to Ashland's use of Dr. Wendland's disposition when Dr. Wendland was present in Court [TT 581]. Despite the District Court's suggestion to do so [TT 730], Ashland never attempted to call Dr. Wendland as a witness to cure its "surprise".

During cross-examination, Ashland moved to strike Kopac's testimony as an expert in phenolic chemistry, on the basis of a self-effacing statement Kopac made during the Milwaukee trial, to the effect that Dr. Wendland (Delta's expert in the Milwaukee case) was more of an expert than Kopac. Ashland argued that Kopac was "not an expert by his own admission". The Court refused to strike the testimony saying "even if that were so", the testimony could be received as the testimony of a lay person.

Nowhere in the trial transcript is there any indication that the District Court intended to admit Kopac's testimony as that of a lay person under Rule 701. Accordingly, Ashland's

assertion that Kopac's opinion testimony was received under Rule 701 rather than Rule 702 is incorrect, and is not supported by either the trial transcript or the District Court Decision.

B. Rules of Evidence

Rule 701 relates to opinion testimony by lay witnesses, while Rule 702 relates to testimony of experts. Rules 701 and 702 have common requirements in that the opinions must be relevant and must be helpful to the trier of fact. The Rules, however, differ, in that Rule 702 is limited to opinions based on "scientific, technical or other specialized knowledge", which opinions may be given only by "a witness qualified as an expert by knowledge, skill, experience, training or education".

In response to Ashland's initial objection to Kopac giving expert testimony, the District Court referred to the "Federal Rules of Evidence on *Expert Testimony*" [Emphasis added], and evidence which aids "the trier of fact in areas that the trier of fact doesn't have any knowledge of". This statement obviously relates to the specific requirements of Rule 702, and not Rule 701.

The District Court also alluded to Kopac's prior testimony concerning his chemistry background. This statement too is a clear reference to Rule 702.

Kopac testified about the chemistry of phenol formaldehyde resins, the design of processes for the manufacture of phenol formaldehyde resins, the reactions of such phenol formaldehyde resins with polyisocyanates to form phenolic urethanes, and the use of such phenolic urethanes as foundry binders. He also testified about the prior art concerning these matters and compared the prior art to the claims of the patents in suit. In view of the record, the contention that Kopac testified as a "lay witness" is disingenuous at best.

Even assuming *arguendo* that Kopac did not know everything about phenolic resins, his testimony is nonetheless admissible. As *Weinstein's Evidence* states:

> "[T]he expert need not have a complete knowledge about the field in question. He need not be certain, and he need not be unbiased. He need only be able to aid the jury in resolving a relevant issue." 3 J. Weinstein & M. Burger, *Weinstein's Evidence*, § 702[04] (1981).

The cases cited by Ashland do not support its position. *Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equipment Corp., Inc. et al.*, 546 F.2d 530 (3rd Cir. 1976), does not discuss the Federal Rules of Evidence at all. None of the others discuss the distinction between Rule 701 and Rule 702. In *Calhoun v. Honda Motor Co., Ltd.*, 738 F.2d 126, 132 (6th Cir. 1984), the expert opinion there was supported by nothing more than conjecture, but the absence of support was brought out at trial through cross-examination. *Calhoun* does not stand for the proposition that the Court of Appeals may discount expert testimony when the basis (or lack thereof) for the testimony is not explored by cross-examination. Ashland's statements are but *ipse dixit* pronouncements.

Ashland's Brief points out that there was conflicting evidence at trial as to several critical issues and argues that Ashland's evidence was more persuasive*. It is clear from reading the District Court Decision that the evidence on these points was in conflict.

It is clear from the Opinion of the Court of Appeals for the Federal Circuit that the testimony of Kopac was entirely discounted and disregarded. The Statement Of The Case in the Petition was prepared to outline the testimony presented at trial on behalf of Delta. The District Court Decision alludes to

---

* Ashland's Brief tacitly concedes Delta's point that "the Court of Appeals Opinion contains numerous technical errors, e.g., Delta failed to offer evidence that the prior art showed how to make the Megson structure . . ." (Petition, p.13).

evidence at trial which was conflicting. It is manifest from Judge Feikens' Decision that he found the evidence offered by Delta to be more persuasive. The Court of Appeals Decision, however, reads as though Delta presented no testimony, which is in conspicuous, clear, and prejudicial error.

C. The Due Process Violation

There is no statement in the trial record or the District Court Decision to support Ashland's argument that Kopac's testimony was considered by the Trial Court to be only that of a layman. Ashland is probably correct in asserting that the Court of Appeals (albeit erroneously) considered Kopac to be a non-expert. The gravamen of Delta's Due Process Claim is that, because the Court of Appeals for the Federal Circuit held *sua sponte* that Kopac was not an expert, and because Ashland failed to make a timely objection at trial, Delta was deprived of its opportunity to present the evidence which the Court of Appeals now holds to be critical. A more clear violation of Due Process could scarcely be demonstrated.

CONCLUSION

It is clear from the trial record, and indeed it is clear from Ashland's Brief, that Kopac's testimony was offered as that of an expert. Ashland first objected to the testimony and later moved to strike Kopac's testimony—both on the grounds that he was not an expert. All of Ashland's objections were overruled, which clearly shows the testimony was considered by the District Court as that of an expert.

The Court of Appeals, sitting as a reviewing Court, is in no position to properly judge the credibility of the experts who testified at trial, and who presented conflicting evidence which was evaluated by the Trial Judge. To have done so in direct contradiction of Rule 52(a) of the Federal Rules of Civil Procedure, and to have made *de novo* substitutions of findings at the appellate level where Delta was given no opportunity to be heard, is a clear violation of Due Process. Only the Supreme Court can remedy this substantive unfairness to Delta and establish, firmly and finally, the proper parameters for appellate review. The Petition for a Writ of Certiorari should be granted for these salutary purposes.

Respectfully submitted,

DONALD E. EGAN*
COOK, WETZEL & EGAN, LTD.
135 South LaSalle Street
Suite 3300
Chicago, Illinois 60603
(312) 236-8500
Attorneys for Petitioners

*Counsel of record